United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 23-0600**
	)	**Issued: September 20, 2023**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 14, 2023 appellant filed a timely appeal from a December 14, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 13 percent permanent impairment of his right lower extremity and 10 percent permanent impairment of his left lower extremity, for which he previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the December 14, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 24, 1963 appellant, then a 23-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he had reinjured his back following a September 1962 employment injury.[4] He retired from the employing establishment in 1995. OWCP initially accepted the claim for lumbosacral sprain and authorized medical treatment, including surgical procedures in 1964, 1965, 1994, 1998, 2012, and 2013. By decision dated December 17, 2014, it expanded the acceptance of the claim to include a 1998 lumbar wound infection, L4-5 pseudo-arthritis, lumbar postlaminectomy syndrome L4-S1, lumbar radiculopathy, and nonunion of fracture.

By decision dated February 26, 2015, OWCP granted appellant a schedule award for 10 percent permanent impairment of his right lower extremity (leg) and 0 percent permanent impairment of his left lower extremity (leg).

On January 20, 2016 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

By decision dated June 13, 2018, OWCP granted appellant an additional schedule award for 3 percent permanent impairment of the right lower extremity (leg), for 13 percent total permanent impairment of the right lower extremity, and 0 percent permanent impairment of the left lower extremity (leg).

On October 9, 2018 appellant appealed to the Board. By decision dated June 21, 2019, the Board set aside OWCP's June 13, 2018 decision and remanded the case for further development.[5] The Board found that there was a unresolved conflict in the medical evidence between Dr. Kevin Komes, a Board-certified physiatrist and second opinion physician, and Dr. M. Stephen Wilson, appellant's treating orthopedic surgeon, regarding the extent of permanent impairment of appellant's bilateral lower extremities due to his accepted conditions. Thus, the Board remanded the case for referral to an impartial medical examiner (IME) to resolve the conflict in medical opinion evidence.

On March 4, 2021 OWCP referred appellant, along with an August 17, 2016 statement of accepted facts (SOAF) and the medical record, to Dr. William Hopkins, a Board-certified

[3] Docket No. 19-0063 (issued June 21, 2019); Docket No. 22-0301 (issued July 25, 2022).

[4] On September 7, 1962 appellant filed a Form CA-1 alleging that on that date he sustained an acute lumbosacral sprain when bending over and repositioning mail trays while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx227. These claims have been administratively combined by OWCP with the current file, OWCP File No. xxxxxx452, serving as the master file.

[5] Docket No. 19-0063 (issued June 21, 2019).

orthopedic surgeon, for an impartial medical examination. The August 17, 2016 SOAF noted appellant's accepted condition only as acute lumbosacral strain.

In a March 9, 2021 report, Dr. Hopkins opined, based on a September 2, 2022 electromyography (EMG) test, that appellant was at maximum medical improvement (MMI). Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[6] he opined that appellant had 27 percent permanent impairment of the whole body due to his August 24, 1963 work injury.

On July 9, 2021 OWCP routed the August 17, 2016 SOAF, the medical record, and a list of questions, to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA). In a July 9, 2021 report, Dr. Harris reviewed the August 17, 2016 SOAF and the medical record. He reported that Dr. Hopkins' examination of appellant demonstrated diffuse decreased sensation and weakness in the bilateral lower extremities in a nonanatomic distribution. Using Dr. Hopkins' examination findings and the sixth edition of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*), Dr. Harris opined that appellant had 0 percent bilateral lower extremity permanent impairment for lumbar radiculopathy.

By decision dated July 22, 2021, OWCP denied appellant's request for an increased schedule award. It accorded the weight of the medical evidence to the July 9, 2021 report of Dr. Harris, the DMA.

On December 15, 2021 appellant appealed to the Board. By decision dated July 25, 2022, the Board set aside OWCP's July 22, 2021 decision and remanded the case for further development as there remained an unresolved conflict in the medical evidence.[7] It found that the August 17, 2016 SOAF, which both Dr. Hopkins, the IME, and Dr. Harris, the DMA, utilized, was deficient as it did not list appellant's additional conditions of a 1998 lumbar wound infection, L4-5 pseudo-arthritis, lumbar postlaminectomy syndrome L4-S1, and lumbar radiculopathy or indicate that he had previously received a schedule award for permanent impairment of his right lower extremity. The Board instructed OWCP to refer appellant and an undated SOAF to Dr. Hopkins for a supplemental report to resolve the existing conflict as to the extent of permanent impairment of appellant's bilateral lower extremities due to his accepted conditions.

On August 2, 2022 OWCP routed an August 2, 2022 SOAF, the medical record, and a list of questions, to Dr. Hopkins with a request to reexamine appellant and render a supplemental impairment report to resolve the existing conflict as to the extent of permanent impairment of appellant's bilateral lower extremities due to his accepted conditions. It requested that he rate appellant's lower extremity permanent impairment pursuant to *The Guides Newsletter*.

In an October 11, 2022 supplemental report, Dr. Hopkins reviewed the August 2, 2022 SOAF and the medical record. Based on appellant's August 30, 2022 examination findings, he indicated that appellant continued to have bilateral lower extremity pain with loss of sensation and

[6] A.M.A., *Guides* (6th ed. 2009).

[7] Docket No. 22-0301 (issued July 25, 2022).

loss of strength.[8] Dr. Hopkins reported that appellant had sensory loss in both feet medially and laterally and in his calf and thigh medically and laterally with loss of muscle strength bilaterally without loss of inguinal or abdominal sensation. He found that appellant's complaints and physical findings were sciatic in nature with generalized weakness in his hip, thigh, and calf motors. Dr. Hopkins indicated that appellant had a 33 percent permanent impairment of the whole body, pursuant to Table 16-2, page 535 of the A.M.A., *Guides*. He related that appellant's impairment stemmed from the peripheral nerve and that the previous right knee replacement was not a contributing factor to his lack of ability, strength and sensation in his bilateral lower extremities. Dr. Hopkins opined that appellant reached MMI on May 5, 2022, and that appellant's total permanent impairment included the previous award for 13 percent permanent impairment.

On November 17, 2022 OWCP routed the August 2, 2022 SOAF, the medical record, and a list of questions, to Dr. Harris, again serving as the DMA, for a permanent impairment rating.

In a November 22, 2022 report, Dr. Harris reviewed the August 2, 2022 SOAF and Dr. Hopkins October 11, 2022 supplemental report, which he indicated demonstrated bilateral sensory loss in the L5, S1 dermatomes with generalized weakness in the lower extremities without specific muscle weakness consistent with lumbar radiculopathy. He indicated that appellant reached MMI on August 30, 2022, the date of Dr. Hopkins' impairment evaluation, as the case file did not contain any medical records prior to that date which documented that appellant had reached MMI. Dr. Harris indicated that while Dr. Hopkins had calculated the impairment for appellant's residuals problems with radiculopathy utilizing the charts for peripheral nerve impairment, FECA utilizes *The Guides Newsletter* for rating permanent impairment of the lower extremities based upon a permanent impairment originating in the spine. For both the right and left lower extremity, he utilized the diagnosis-based impairment (DBI) method to render an impairment rating as the A.M.A., *Guides* did not allow for range of motion methodology for the lower extremities/lumbar spine. Using Dr. Hopkins' August 30, 2022 examination findings, Dr. Harris found a the class of diagnosis (CDX) for the right L5 lumbar radiculopathy resulted in a Class 1 impairment for six percent impairment of the lower extremity for residual problems with severe pain/impaired sensation. He also found a CDX of 1 for the right S1 lumbar radiculopathy for 4 percent impairment for residual problems with severe pain/impaired sensation. Dr. Harris indicated that this resulted in 10 percent right lower extremity impairment and 10 percent left lower extremity impairment. He opined that there was no increase in the right lower extremity impairment as appellant had previously been awarded 13 precent right lower extremity impairment.

By decision dated December 14, 2022, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity (leg) and no additional impairment of the right lower extremity than the 13 percent permanent impairment previously received. The award ran for 28.8 weeks for the period August 30, 2022 to March 19, 2023.

[8] A copy of the August 30, 2022 examination was not of record.

LEGAL PRECEDENT

The schedule award provisions of FECA[9] and its implementing regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.*[13] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment of the CDX, which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15] The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.[16]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[17] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[18] The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id*. *See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[13] A.M.A., *Guides* 3, section 1.3.

[14] *Id*. at 493-556.

[15] *Id*. at 521.

[16] *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[17] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.D.*, Docket No. 20-0553 (issued April 19, 2021); *A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[18] *See supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3) (March 2017).

evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[19]

In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[20]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[21] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[22]

ANALYSIS

The Board finds that this case is not in posture for decision.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 22, 2021 decision because the Board considered that evidence in its July 25, 2022 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[23] The Board, therefore, need not review the evidence addressed on prior appeal.

Following the Board's July 25, 2022 decision, OWCP referred appellant back to Dr. Hopkins, the IME, for an additional examination and evaluation of permanent impairment. It specifically requested that he rate appellant's permanent impairment of the lower extremities pursuant to *The Guides Newsletter*. In an October 11, 2022 supplemental report, Dr. Hopkins reviewed the updated SOAF and reported his August 30, 2022 examination findings regarding bilateral sensory loss and bilateral strength loss. He indicated that appellant reached MMI on May 5, 2022. Dr. Hopkins opined appellant's lack of ability, strength and sensation in his bilateral lower extremities stemmed from the peripheral nerve. He opined that appellant had 33 percent permanent impairment of the whole body, pursuant to Table 16-2 of the A.M.A., *Guides*. In this

[19] *Id*. at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

[20] *The Guides Newsletter*; A.M.A., *Guides* 430.

[21] 5 U.S.C. § 8123(a).

[22] *See A.D., supra* note 17; *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0476 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *James P. Roberts*, 31 ECAB 1010 (1980).

[23] *F.H.*, Docket No. 21-0579 (issued December 9, 2021); *D.A.*, Docket No. 19-1965 (issued February 10, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

supplemental report, Dr. Hopkins did not specifically rate appellant's permanent impairment pursuant to *The Guides Newsletter*.

The Board has held that, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the IME to correct the defect in his original report.[24] If the IME is unable to clarify or elaborate on the original report, or if the supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to another IME for the purpose of obtaining a rationalized medical opinion on the issue.[25]

The supplemental opinion of the IME, Dr. Hopkins, is not entitled to the special weight of the medical evidence as he did not properly rate appellant's permanent impairment utilizing *The Guides Newsletter*. Therefore, in order to address the unresolved conflict in the medical opinion evidence, the case will be remanded to OWCP for referral to a new IME for the purpose of obtaining a rationalized medical opinion regarding any employment-related permanent impairment of the lower extremities, pursuant to *The Guides Newsletter*.[26] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on this schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

[24] *See F.H.*, Docket No. 17-1924 (issued January 25,2019); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also supra* note 12 at Chapter 2.810.11e (September 2010).

[25] *Id*.

[26] *M.D.*, Docket No. 19-0510 (issued August 6, 2019).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 20, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board